

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NEW HAMPSHIRE
SUPREME COURT
RECEIVED

In The Matter Of The Liquidation Of
The Home Insurance Company

2004 JUN 11 A 10: 24

No. 2004-0319

**APPELLANT BENJAMIN MOORE & CO.'S OBJECTION TO THE LIQUIDATOR'S
MOTION TO DISMISS**

Appellant, policyholder-claimant Benjamin Moore & Co. ("Benjamin Moore"), hereby respectfully objects to the Liquidator's Motion To Dismiss. In support of its Objection, Benjamin Moore relies upon the attached Memorandum of Law, and states as follows:

1. Benjamin Moore has standing to appeal the Superior Court's Order.
2. Benjamin Moore is a Class II policy-holder claimant, and therefore is within the class of persons the Legislature sought to protect in establishing a strict order of distribution of estate assets under the Insurers Rehabilitation and Liquidation Act, R.S.A. 402-C:1 et seq. See R.S.A. 402-C:1(IV)("the purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally")(emphasis added); R.S.A. 402-C:44(II)("claims by policyholders" are class II claims). Accordingly, Benjamin Moore has a clear, legally cognizable interest in this proceeding.
3. The trial court's order authorizes the Liquidator to enter an agreement under which over \$100,000,000.00 of estate assets will be distributed to a preferred subclass of junior (Class V) claimants before senior claimants are paid.
4. As a senior (Class II) claimant, Benjamin Moore has been aggrieved by the trial court's decision, because the decision authorizes the distribution of a huge estate asset in

violation of the strict order of distribution scheme set forth in the Insurers Rehabilitation and Liquidation Act. R.S.A. 402-C:44.

5. The Liquidator's suggestion that Benjamin Moore lacks standing because, according to the Liquidator, a separate company that is owned by Benjamin Moore's parent company may be exposed to liability, is irrelevant and unfounded. The Liquidator has not presented facts sufficient to disregard Benjamin Moore's corporate identity or otherwise ignore its independent status as a class II creditor of the Home estate.

WHEREFORE, Appellant Benjamin Moore respectfully requests that the Court,

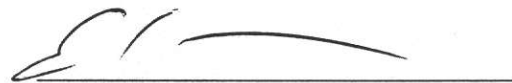
1. Deny the Liquidator's Motion to Dismiss; and
2. Grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

DOWNS RACHLIN MARTIN PLLC

June 10, 2004

By:



Andre Bouffard
Eric Jones
Attorneys for Benjamin Moore & Co.
199 Main Street
P.O. Box 190
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CERTIFICATE OF SERVICE

I, Eric D. Jones, do hereby certify that on this date, I served a true copy of the foregoing upon Ronald Snow, Esq. of Orr & Reno, One Eagle Square, P.O. Box 3550, Concord, New Hampshire 03302-3550 and Peter C.L. Roth, Esq., Senior Assistant Attorney General, Environmental Protection Bureau, New Hampshire Department of Justice, 33 Capital Street, Concord, New Hampshire 03301-6397, by first class mail, postage prepaid.

Dated: June 10, 2004



Eric D. Jones

BTV.267954.1

DOWNS
RACHLIN
MARTIN PLLC

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In The Matter Of The Liquidation Of
The Home Insurance Company

2004 JUN 11 A 10: 24

No. 2004-0319

**APPELLANT BENJAMIN MOORE & CO.'S MEMORANDUM OF LAW IN SUPPORT
OF ITS OBJECTION TO THE LIQUIDATOR'S MOTION TO DISMISS**

Appellant, policyholder-claimant Benjamin Moore & Co. ("Benjamin Moore"), hereby respectfully submits this Memorandum to support its Objection to the Liquidator's Motion To Dismiss. As explained below, Benjamin Moore has clear legal standing to pursue this appeal, and the Liquidator's motion should be denied.

INTRODUCTION

Nature Of The Appeal

By this appeal, Benjamin Moore seeks review of a trial court order that permits the Liquidator of the Home Insurance Company to distribute over \$100,000,000.00 in estate assets to junior creditors, in violation of the express provisions of the Insurers Rehabilitation and Liquidation Act, R.S.A. 402-C:1 et seq. (the "Act" or "liquidation statute"). See R.S.A. 402-C:44 (setting forth a strict Order of Distribution of estate assets). By authorizing the distribution of assets to junior creditors before senior creditors are paid in full, the trial court altered the statutory rules of priority and created a special class of creditors who enjoy "super priority" status. Because the order offends the Act as a matter of law, Benjamin Moore asks this Court to reverse the trial court's decision and vacate the order.

Factual and Procedural Background

Benjamin Moore is a policy-holder of Home Insurance Company. To protect its interests, Benjamin Moore filed a proof-of-claim in the liquidation proceeding, as required by the Act and the Superior Court's Liquidation Order. As a policy-holder claimant, Benjamin Moore enjoys Class II priority in the distribution of assets of the Home estate. R.S.A. 402-C:44 (II)(including "claims by policyholders" in Class II).

As a Class II claimant, Benjamin Moore has a direct and substantial interest in the proper administration of the Home estate. Thus, when the Liquidator sought court approval to enter an agreement to facilitate a "scheme of arrangement" under which the Liquidator proposed to distribute 50% of certain estate assets, which could exceed \$100,000,000.00 to certain preferred Class V creditors before paying senior claimants in full, Benjamin Moore was reasonably concerned. To protect its interests, and to prevent a wrongful distribution of assets to junior claimants, Benjamin Moore filed an objection.

In its objection, Benjamin Moore demonstrated that (1) the proposed distribution of assets violated the clear and strict statutory Order of Distribution set forth in R.S.A. 402-C:44, and (2) the Liquidator failed to proffer sufficient facts to explain why the proposed agreement was in the best interest of the estate and was fair and equitable.¹

¹ A settlement in a liquidation proceeding must be shown by the proponent, who carries the burden of persuasion, to be in the best interest of the estate, and to be fair and equitable. In re American Reserve Corp., 841 F.2d 159, 161-62 (7th Cir. 1987); In re C.P. del Caribe, Inc., 140 B.R. 320, 326 (Bankr. D.P.R. 1992)("[t]he proponents of a compromise and settlement have the burden of persuading the court"). The Court, after being informed of all the relevant facts and information, must make its own independent determination as to whether the settlement meets the standards for approval. American Reserve, 841 F.2d at 162. The Court may not simply accept the recommendation of the trustee or liquidator that a compromise is reasonable, without conducting its own informed analysis, and it is never enough for a liquidator to justify a settlement with cursory statements such as "the alternative to settlement is extensive litigation at heavy expense." In re Dow Corning Corp., 192 B.R. 415, 422 (Bankr. E.D. Mich. 1996); see also In re American Reserve, 841 F.2d at 162 (the court may not simply accept the trustee's word that the settlement is reasonable, nor may the court merely "rubber stamp" the trustee's proposal). The trial court's order violates these fundamental principals.

The trial court held a status conference on April 9, 2004, during which it determined that the issue of whether the proposed agreement violated the Act as a matter of law should be decided first. Accordingly, it scheduled a hearing and permitted the parties to submit additional memoranda on the threshold legal issues. The trial court stated that it would address the need for an evidentiary hearing after deciding the threshold legal issue. See Transcript of April 9, 2003 Status Conference at 9-10 & 19-20 (copies of the relevant pages are attached).

Then, by order dated April 29, 2004, the trial court summarily overruled Benjamin Moore's objection and granted the Liquidator's motion for approval of the agreement. The trial court never held an evidentiary hearing, and thus failed to permit the development of any factual record upon which the court could make any determination or findings as to whether the agreement was in the best interest of the estate.

In its Order, the trial court did not discuss or analyze the statutory order of distribution mandated by R.S.A. 402-C:44, nor did it even recognize its duty to independently determine whether the agreement is in the best interest of the estate. Rather, the court merely cited the Liquidator's general powers to marshal assets and administer an estate, see Order at 2 (attached to the Liquidator's Memorandum), and concluded based on these general powers that the Liquidator had statutory authority to approve the agreement on behalf of the Home estate. On June 1, 2004, the trial court "clarified" its Order, indicating that it did not need any factual development to rule that the Liquidator's deviation from the statutory mandated priority scheme was permissible as a matter of law. See June 1, 2004 Order (attached).

Because the trial court erred when it (a) approved an agreement that directly violates the order of distribution under the Act, (b) failed to allow development of any factual record or conduct an evidentiary hearing, and (c) failed to conduct any meaningful independent review of

whether the proposed agreement is in the best interest of the estate, Benjamin Moore timely filed a Notice Of Appeal.

The Current Motion

The Liquidator seeks to prevent Supreme Court review. He has filed a Motion To Dismiss in which he argues that this Court lacks subject matter jurisdiction because Benjamin Moore lacks standing to bring the appeal. The Liquidator's argument is unfounded and should be rejected.

Benjamin Moore is a senior claimant with a clear legal interest in demanding that estate assets be distributed in accordance with the statutory order of distribution. A distribution of assets – particularly a distribution of over \$100,000,000.00 – that favors junior creditors ahead of senior creditors such as Benjamin Moore is clearly adverse to Benjamin Moore's legally cognizable interests. Benjamin Moore thus has standing and its appeal should be heard.

ARGUMENT

I. Legal Standards Of Standing

The liquidation statute does not specifically address appeals of orders concerning the administration of an estate, and it does not define which parties have standing to participate. Moreover, this Court has not discussed the issue of standing to appeal court orders in the context of insurance company liquidation proceedings. Accordingly, it is unclear what standards apply.

The standard for whether a party has standing to bring a cause of action "focus[es] on whether the [party] suffered a legal injury against which the law was designed to protect." Roberts v. General Motors Corp., 138 N.H. 532, 535 (1994). In discussing standing to challenge the validity of a law, this Court has held that the challenging party must show that "some right of

his is impaired or prejudiced thereby.” Silver Brothers, Inc. v. Wallin, 122 N.H. 1138, 1140 (1982). In appeals from administrative agencies, a party has standing when it “has sustained the requisite ‘injury in fact’.” Weeks Restaurant Corporation v. City of Dover, 119 N.H. 541, 543 (1979)(citing R.S.A. 541:8).

In the insurance company liquidation context, courts in other jurisdictions generally inquire whether the appealing party is among a class of persons that the liquidation statute is intended to protect. See, e.g., Metcalf v. Investors Equity Life Insurance Company of Hawaii, Ltd., 910 P.2d 110, 111 (Haw. 1996)(concluding that shareholders of liquidated insurance company lacked standing because the statutory purpose of the liquidation statute did not include shareholders as a class of persons to be protected); Hartnett v. Southern American Fire Ins., 495 So.2d 902, 903 (Fla. App. 1986)(same); LeFarge Corp. v. Insurance Department, 690 A.2d 826, 836-37 (Pa. Cmwlth. 1997)(policyholders have standing because they have an interest specifically protected by the liquidation statute) rev’d. on other grounds, 735 A.2d 74 (Pa. 1999); see also Plaza v. Stephens, 913 S.W.2d 319, 322 (Ky. 1996)(nonvoting shareholders of insurer in liquidation lacked standing because they lacked “a judicially recognizable interest in the subject matter”).

This Court should adopt the standard applied in these liquidation cases. Like the statutes at issue in those cases, the New Hampshire statute identifies the persons the legislature intended to protect. R.S.A. 402-C:1(IV)(“the purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally”)(emphasis added). Accordingly, standing should be afforded to any party that has an interest in the proceedings that the legislature intended to protect. As explained in Section II below, under this standard, Benjamin Moore clearly has standing.

The Liquidator advocates a standard under which a party must show that it has been “aggrieved.” Memorandum In Support Of Motion To Dismiss at 8. The insurance company liquidation cases do not support such a standard. Nevertheless, as explained in Section III below, even if the Court requires a showing that a party’s interest has been adversely affected, Benjamin Moore satisfies this standard.

Under either standard, Benjamin Moore has standing to pursue its appeal because it has an interest in these proceedings, its interest is one the legislature intended to protect, and its interest is directly affected by the trial court’s order.

II. As A Class-II Claimant, Benjamin Moore Is Within A Class Of Persons The Act Protects, And Benjamin Moore Thus Has A Direct Legal Interest In These Proceedings Sufficient To Confer Standing.

The liquidation statute expressly states that “the purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally.” R.S.A. 402-C:1(IV)(emphasis added). This language establishes beyond any doubt that policyholders like Benjamin Moore are a class of persons who have an interest that the statute is designed to protect. C.f. Estate of Ella Kelly, 130 N.H. 773, 778 (1988)(heirs have standing to appeal an order of the probate court, because heirs are among the classes of persons with legal and equitable interests in the estate).

In addition, other provisions of the Act demonstrate that policyholders have an important, protected interest. Under the provisions for Liquidation Orders, the statute provides, “[u]pon issuance of the order, the rights and liabilities of any such insurer and of its creditors, policyholders, shareholders, members, and all other persons interested in the estate are fixed as of the date of filing of the petition for liquidation.” R.S.A. 402-C:21 (emphasis added). By referring to “other persons interested in the estate” after a list of persons that includes policyholders, the Legislature left no doubt that policyholders are persons with an interest in the

estate. The provisions for required notices provide, “[t]he liquidator shall give notice of the liquidation order . . . to all persons known or reasonably expected to have claims against the insurer, including all policyholders.” R.S.A. 402-C:26 (I)(a)(emphasis added). The requirement that the Liquidator send notice to policyholders is yet another expression of legislative intent to protect the interests of policyholders.² Finally, the fact that policyholder claims are Class II claims, second only to administration costs, see R.S.A. 402:44(I) and (II), demonstrates that the interests of policyholders are important and substantial.

As a policyholder, Benjamin Moore has a clear, direct, and legally cognizable interest in this proceeding, and it therefore has standing to appeal the trial court’s Order.

III. Benjamin Moore’s Interests Have Been Adversely Impacted, And It Is Thus An “Aggrieved Party” With Standing To Maintain This Appeal.

Even if this Court requires a showing that a party has been “aggrieved,” Benjamin Moore has standing because its statutorily protected interests have been affected. As explained above, the trial court’s order authorizes the Liquidator to enter an agreement under which 50% of certain estate assets, potentially exceeding \$100,000,000.00 will be distributed to junior claimants (class V claimants) before senior claimants (such as Benjamin Moore) are paid. As a senior claimant, Benjamin Moore has been aggrieved by the trial court’s decision, because it authorizes the distribution of a huge estate asset in violation of the strict distribution scheme set forth in the Act. R.S.A. 402-C:44.

² That the Liquidator failed to provide any notice to Benjamin Moore (and virtually every other Class II policyholder creditor) of his motion for approval of the agreement with certain preferred Class V junior creditors does not in any way diminish Benjamin Moore’s status as a Class II policyholder creditor, although it speak volumes about the Liquidator’s attempt at avoiding any meaningful creditor scrutiny of the agreement involved in the motion.

The priority provisions of the Act create a strict, comprehensive, and exclusive scheme for the distribution of estate assets to various classes of claimants. Before enumerating ten (10) separate classes of claimants in order of priority, the statute provides:

Order of Distribution.

The order of distribution of claims from the insurer's estate shall be as stated in this section. . . . [E]very claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses shall be established within any class.

RSA 402-C:44 (emphasis added). This provision establishes three clear principles.

First, distribution of estate assets “shall” be in accordance with the priorities established by RSA 402-C:44 I through X. Accordingly, the statute permits no discretionary or equitable deviation from the statutory scheme. See In re: Liquidation of Coronet Insurance Company, 698 N.E.2d 598, 603 (Ill. App. 1st Dist. 5th Div. 1998)(court lacked the power to deviate from the statutory priority scheme); State v. Interstate Casualty Insurance Company, 464 S.E.2d 73, 77 (N.C. App. 1995)(in light of comprehensive statutory scheme for the determination of claim priority, court could not invoke equitable doctrines to deviate from order of distribution); Couch On Insurance § 6:8 (3d ed.)(“Statutory priorities are generally regarded as exclusive and should not be disturbed by the creation of equitable priorities”).

Second, the statute codifies a rule of “absolute priority,” by commanding that “every claim in each class shall be paid in full . . . before the members of the next class receive any payment.” See In Re: The Liquidation of Security Casualty Company, 537 N.E.2d 775, 780 (Ill. 1989)(recognizing the statutory rule of “absolute priority” prohibiting succeeding class claimants from receiving any share in the distribution of assets before the claims of all senior interests have been paid in full, and overruling trial court order that allowed junior class claimants to receive

funds ahead of all other claimants). Thus, Class V claimants, such as the Liquidator's preferred AFIA Cedents here, cannot receive any portion of estate assets until all claims in classes I through IV have been paid in full.

Third, "[n]o subclasses shall be established within any class." The Liquidator's agreement was approved by the trial court, notwithstanding that it provides for preferential treatment of a certain select group of preferred Class V creditors by distributing potentially more than \$100,000,000 of estate assets to a handful of Class V creditors.

The agreement approved by the trial court offends each of these statutory mandates. The clear effect of the agreement is (1) to create a subclass of claimants (the "AFIA Cedents") within Class V, and (2) to elevate the interests of the members of this subclass above the interests of all other claimants. Not only does the agreement impermissibly provide for payment to a subclass of Class V claimants before other claimants are paid, the agreement unlawfully creates a "super priority," because the Liquidator will pay these claimants directly from the proceeds of specific reinsurance claims before even Class I claimants are paid from general estate assets. See In the matter of Conservation Alpine Insurance Company, 741 N.E.2d 663, 668 (Ill. App. 1st Dist. 4th Div. 2000)(rejecting rehabilitation plan that impermissibly created a sub-class of claimants in violation of the priority statute); In Re: The Liquidation of Security Casualty Company, 537 N.E.2d at 780 (vacating trial court's recognition of a constructive trust in favor of junior class claimants because the effect would be to impermissibly "boost the [junior claimants] over those in the statutory ladder, granting the [junior claimants] a super-priority ahead of all other claimants in the liquidation proceedings").

The Liquidator argues that Benjamin Moore is not aggrieved because it will benefit from the court's Order in the sense that Class II creditors will share with the AFIA Cedents in a

portion of the reinsurance recovery that the Liquidator seeks to make via the agreement. Liquidator's Memorandum In Support Of Motion To Dismiss at 2, 6, 12. The potential for some economic benefit to Class II creditors cannot, however, deprive them of their statutory rights under the Act's distribution scheme. Class II creditors have a statutory right to be paid in full before creditors in any of the lower classes get paid anything. The Liquidator made no showing in the trial court that Class II Claimants will be paid in full. The trial court's order blithely overlooks this gross deviation from the statutory distribution scheme on the basis that Class II Creditors will get some economic benefit not otherwise available. This "expediency rationale" for the agreement that is advocated by the Liquidator, and was accepted by the trial court, runs afoul of the statutory distribution scheme, and Benjamin Moore's statutory rights as a Class II creditor. It is those rights Benjamin Moore seeks to vindicate in this appeal.

IV. The Interests Of Other Companies Owned By Benjamin Moore's Parent Company Are Irrelevant And Cannot Form The Basis For Denying Benjamin Moore's Standing To Seek This Court's Review Of An Order That Violates The Act.

The Liquidator's final challenge is an attack on Benjamin Moore's motives. According to the Liquidator, Benjamin Moore is not genuinely pursuing its own interests, but is merely advancing the interests an affiliated company. The Liquidator claims that Benjamin Moore's parent company owns a third company which is a reinsurer of the INA Agreement obligations. Liquidator's Memorandum Of Law at 13. Apparently, the Liquidator suggests that since this third party company has an interest but lacks direct standing, Benjamin Moore should be deemed to lack standing.

The Liquidator's position is irrelevant and unfounded. First, the Liquidator has not cited any authority for the proposition that a party with standing will lose standing based on the interests of related company within a corporate group. Second, the Liquidator's position is

essentially an argument that the Court should disregard the separate corporate identity of Benjamin Moore and its parent company, and analyze the standing issue in light of the interests of a third company. However, the Liquidator has not presented any facts supporting disregard of Benjamin Moore's corporate identity (much less to do so twice) or otherwise ignore Benjamin Moore's independent status as a class II creditor of the Home estate. See Norwood Group, Inc. v. Phillips, 149 N.H. 722 (2003)(discussing grounds to "pierce the corporate veil"); Peter R. Previte, Inc. v. McAllister Florist, Inc., 113 N.H. 579 (1973)(same). The Liquidator's final argument should therefore be rejected.

CONCLUSION

Benjamin Moore is a Class II claimant with a clear legal interest in the proper distribution of assets of the Home estate. Benjamin Moore has been aggrieved by the trial court's order authorizing a distribution of a substantial asset to junior creditors in violation of the Act. Therefore, Benjamin Moore has standing, and the Liquidator's motion should be denied.

June 10, 2004

Respectfully submitted,

DOWNS RACHLIN MARTIN PLLC

By:



Eric D. Jones
Andre D. Bouffard
Attorneys for Benjamin Moore & Co.
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CERTIFICATE OF SERVICE

I, Eric D. Jones, do hereby certify that on this date, I served a true copy of the foregoing upon Ronald Snow, Esq. of Orr & Reno, One Eagle Square, P.O. Box 3550, Concord, New Hampshire 03302-3550 and Peter C.L. Roth, Esq., Senior Assistant Attorney General, Environmental Protection Bureau, New Hampshire Department of Justice, 33 Capital Street, Concord, New Hampshire 03301-6397, by first class mail, postage prepaid.

Dated: June 10, 2004



Eric D. Jones

BTV.267960.1

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THE STATE OF NEW HAMPSHIRE

NH SUPERIOR COURT
MERRIMACK COUNTY
SUPERIOR COURT
CONCORD, NH

MERRIMACK COUNTY

In the Matter of the)
Liquidation of the Home) Docket No: 03-E-0106
Insurance Company)

STATUS CONFERENCE

Before: Honorable Kathleen A. McGuire
Presiding Justice, held at
Concord, New Hampshire, on
Friday, April 9, 2004

* * *

APPEARANCES:

For the Liquidator: Peter Roth
Attorney at Law

For the Respondents: Ron Snow
(ACE Companies) Attorney at Law

Pieter Van Tol
Gary Lee
Attorneys at Law

(Benjamin Moore) Andre D. Bouffard
Attorney at Law

Court Reporter: Michelle A. H. McGirr
CSR/RPR
Official Court Reporter

* * *

1 THE COURT: Well, isn't the issue, I
2 mean, whether the Court has the authority to
3 order such an agreement?

4 MR. VAN TOL: It is, Your Honor, in
5 the first instance. All we are saying as a back
6 up, if the Court is at all inclined to say that
7 the liquidator does have such a power, it is his
8 responsibility to show why that exercise of
9 discretion --

10 THE COURT: Okay.

11 MR. VAN TOL: -- is at all rational.

12 THE COURT: So there are two different
13 issues. One is whether such an agreement can be
14 ordered, but the second one is whether it's an
15 abuse of discretion, I guess, to order it.

16 MR. VAN TOL: Precisely, Your Honor.
17 We don't believe the liquidator has such
18 discretion, but to the extent he does, it has to
19 have a rational basis. It's that basis on which
20 there's a wealth of complex facts.

21 THE COURT: I guess then I would
22 rather do it in two parts then, the matter of
23 whether or not as a matter of law it's something

1 that can be ordered and then whether or not the
2 Court should exercise -- say that it is
3 something the Court can do -- whether the -- and
4 get to the later issue if -- and I don't even
5 know if that would be an issue, I'm not saying
6 that, but if it is an issue, then take it up at
7 that point --

8 MR. VAN TOL: Certainly.

9 THE COURT: -- and do it in two steps.

10 MR. VAN TOL: Would you anticipate
11 accepting further briefing? If there's late
12 issues raised in the Court's reply, we would
13 like to bring it to Court's attention.

14 THE COURT: Sure. Okay.

15 So is that okay, Mr. Roth?

16 MR. ROTH: Yeah, I think that would
17 work for us. Again, we're on -- time is of the
18 essence, Your Honor -- a very short time frame
19 so if they have additional briefing, I would say
20 let's see it by the middle of next week. I
21 mean, we've got -- I keep coming back to this
22 point. Why are they here and I think the
23 pleading they filed yesterday really says it

1 their debt to the estate.

2 MR. VAN TOL: Your Honor, just
3 briefly.

4 Mr. Roth's comments show exactly why
5 we need discovery. I'm assuming now that we go
6 past the initial briefing stage and Your Honor
7 finds there is some discretion by the
8 liquidator, Mr. Roth would have us accept
9 everything he says as true. That the AFIA
10 Cedents will not file the claims, that there is
11 a substantial threat of ring fencing, that there
12 is a substantial threat of side agreements that
13 would cut out the liquidator. Those are the
14 very facts that cannot be accepted simply on
15 self-interested affidavits. Those are the ones
16 that we would request an evidentiary hearing
17 on. And in order to make the evidentiary
18 hearing meaningful for the Court, short and
19 concise, we would also submit we should have a
20 chance to depose those people and make it an
21 efficient process.

22 THE COURT: I don't want to move to
23 that issue until we decide as a matter of law.

1 MR. VAN TOL: I understand, Your
2 Honor.

3 THE COURT: And I take it everybody
4 agrees that at least as to whether as a matter
5 of law the Court can approve such an agreement
6 or such an agreement's valid, that no further
7 discovery is necessary for that issue.

8 MR. VAN TOL: We would be willing to
9 submit further briefing and be heard by the
10 Court on that issue, yes, Your Honor.

11 THE COURT: Okay.

12 MR. VAN TOL: And quickly, the last
13 point Mr. Roth is talking about, what the world
14 should look like post liquidation. The statute
15 tells the Court exactly what the world is
16 supposed to look like. We are not trying to do
17 anything other than enforce the statute, Your
18 Honor.

19 THE COURT: All right. Why don't --
20 any further pleadings then be due next
21 Wednesday, the 14th. Can you make that date?

22 MR. VAN TOL: I'm afraid I can't. I'm
23 going to be out of town on other business. If

THE STATE OF NEW HAMPSHIRE
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DOWNS, RACHLIN & MARTIN
BURLINGTON

NOTICE OF DECISION

ANDRE BOUFFARD ESQ
DOWNS RACHLIN MARTIN PLLC
199 MAIN STREET PO BOX 190
BURLINGTON VT 05402-0190

03-E-0106 In the Matter of Rehabilitation of TheHome Insurance Company

Please be advised that on 6/01/2004 Judge McGuire made the following order relative to:

Court Order ;
Order Relative to Stay of April 29,2004 Order

Court Order ;
Addendum to Order of April 29,2004

06/02/2004

William McGraw
Clerk of Court

cc: Roger A. Sevigny, Commissioner of Ins.
Suzanne M. Gorman, Esq.
Peter Bengelsdorf
Peter C.L. Roth, Esq.
Eric A. Smith, Esq.
J. David Leslie, Esq.
Paula T. Rogers, Esq.
Ronald L. Snow, Esq.
Eric Jones, Esq.
Pieter Van Tol, Esq.
Gary S. Lee, Esq.
Adam Goodman, Esq.
Gail M. Goering, Esq.
Eric A. Haab, Esq.

AOC Form SUCP050 (Rev. 09/27/2001)

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

ADDENDUM TO ORDER OF APRIL 29, 2004

The Court Order of April 29, 2004 granted the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents. The Order did not expressly address the alternative request by ACE Companies and Benjamin Moore & Co. for further evidentiary hearing to determine whether the Liquidator exercised his authority reasonably by endorsing the agreement. The matter is clarified below.

The agreement at issue was pursued in conjunction with the Provisional Liquidation in the United Kingdom. The Joint Provisional Liquidators appointed by the High Court and the Informal Creditors Committee established under English law negotiated the terms. In endorsing the agreement, the Liquidator moved to marshal assets and secure access to an estimated \$231 million of ACE Companies reinsurance and indemnification obligations. The ACE Companies interest is directly contrary to the liquidation's interest which is to maximize opportunity to access this asset.

In the absence of the agreement, AFIA Cedents, whose filing and prosecution of claims triggers the reinsurance and indemnification obligations of ACE Companies, have little incentive to file claims. Under the specific financial realities of this liquidation, Class V claimants would bear the expense of filing and prosecuting claims without realistic prospect of any distribution.